***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

# 74-1545

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 74-1545

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I-291 Why? Association, on behalf of itself and its members,

Plaintiff-Appellee

v.

Joseph B. Burns, as Connecticut Commissioner of Transportation, George S. Koch, as Connecticut Deputy Commissioner of Transportation, Bureau of Highways, A. J. Siccardi, as Division Engineer for Connecticut, Federal Highway Administration, William H. White, as Regional Director of the Federal Highway Administration for the Northeastern Region and Claude Brinegar as Federal Secretary of Transportation

Defendants-Appellants

B P/S



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BRIEF OF STATE APPELLANTS
ON APPEAL
from
UNITED STATES DISTRICT COURT OF CONNECTICUT

Decision of Blumenfeld, J.
Reported in
372 F. Supp. 223 (1974), 6 ERC 1275

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## TABLE OF CONTENTS

## TABLE OF CONTENTS



Please note:

The page numbers appearing in the deferred appendix coincide with the page numbers of the District Court's Ruling on Motion for Preliminary Injunction, which is Document No. 7 of the Record on Appeal.

## TABLE OF CASES AND STATUTES

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I.

## ISSUES ON APPEAL

The construction of the southwest quadrant of Interstate 291 is a major federal action "requiring the preparation and issuance of an environmental impact statement (EIS) pursuant to the provisions of the National Environment Policy Act of 1960 (NEPA)."

The issues are:

Did the United States District Court err in ruling that:

a) Laches is not a bar to the relief awarded by the court to the plaintiff;

b) The authorship of the EIS is not in compliance with NEPA;

c) The EIS is inadequate in its description and discussion of alternatives;

d) The EIS gave inadequate consideration to the potential noise and air quality impacts of I-291.

## II.

## STATEMENT OF THE CASE

### A.

### NATURE OF THE CASE

Plaintiff, I-291 Why? Association, is an unincorporated association of persons aggrieved by present plans for the construction of the southwest quadrant of I-291, a multilane controlled access, divided highway which would run for about 7.6 miles through Rocky Hill, Wethersfield, Newington, New Britain and Farmington, Connecticut, linking I-91 south of Hartford, Connecticut with I-84 west of Hartford. Defendants are Joseph B. Burns, as Connecticut Commissioner of Transportation; George S. Koch as Connecticut Deputy Transportation Commissioner, Bureau of Highways; A. J. Siccardi, as Division Engineer for Connecticut, Federal Highway Administration; William H. White, as Regional Director of the Federal Highway Administration for the Northeastern Region; Claude Brinegar, as Federal Secretary of Transportation.

Plaintiff filed a complaint seeking injunctive and declaratory relief and alleged as separate causes of action defendants' breach of four federal statutes. In moving for a preliminary injunction to halt construction of I-291, plaintiff has by agreement with defendants restricted its attack to its first cause of action: defendants' alleged breach of the duties imposed on them by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4331, et seq.

Plaintiff sets forth five counts in its First Cause of Action. The first count alleges that the air pollution and noise generated by I-291 as indicated by defendants' own studies made after completion of the EIS, will be so great as to violate the substantive mandate of section 101(b)(3) of NEPA, 42 U.S.C. § 4331(b)(3), directing federal agencies to act so as to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." The second count accuses defendants of failing to act in accordance with the "continuing responsibility" for environmental problems required of federal agencies by section 101(b) of NEPA, insofar as they failed to incorporate air and noise pollution data obtained by them after completion and approval of the original EIS, into a supplemental EIS duly circulated among and approved by responsible public agencies. The third count alleges that the original EIS was not prepared in accordance with pertinent Federal Highway Administration (FHWA) guidelines, and count four alleges that the EIS lacked the adequacy and good faith preparation required by NEPA, and that the EIS was not prepared "by the responsible official" as directed by NEPA. The fifth count asserts that defendants violated their duty of "continuing responsibility" under NEPA by failing to file a supplemental EIS once it became apparent that the southwest

quadrant of I-291 would be the only portion of the entire Hartford metropolitan beltway to be constructed in the foreseeable future. Issue was joined on these five counts at a hearing of several days' duration on plaintiff's motion for a preliminary injunction.

B.

## COURSE OF THE PROCEEDINGS

### 1. Disposition in Court below

On February 7, 1974, the United States District Court (Blumenfeld, J.) issued an injunction "enjoining defendants, their officers, agents, servants, employees, and attorneys from any further acts or expenditures for the construction of I-291 until further order of the Court."

In its Ruling on Motion for Preliminary Injunction, the court declared that:

a) Laches is not a bar to the relief awarded by the Court to the plaintiff;

b) Authorship of the EIS is not in compliance with NEPA;

c) The EIS is inadequate in its description and discussion of alternatives;

d) The EIS gave inadequate consideration to the potential noise and air quality impacts of I-291.

2. Prior Proceedings

On April 5, 1974, the state defendants, Joseph B. Burns and George S. Koch, filed their Notice of Appeal to the United States Court of Appeals for the Second Circuit. The federal defendants filed their Notice of Appeal on April 5, 1974. Thereafter, the federal appellants filed their Voluntary Motion of Dismissal of their appeal pursuant to Rule 42(b), Federal Rules of Appellate Procedure. State defendants filed objection to the Voluntary Motion of Dismissal. Oral arguments were heard by the United States Circuit Court of Appeals for the Second Circuit on May 21, 1974, and the Motion for Dismissal of their appeal was granted on that day to the federal defendants. State defendants now appeal alone from the decision of the United States District Court (Blumenfeld, J.) filed on February 7, 1974.

C.

## STATEMENT OF FACTS

1.

### BACKGROUND OF CASE

The general location for an expressway such as I-291 has been under consideration for some twenty years. I-291 Why? Association v. Joseph B. Burns, et al, 372 F. Supp. 223 (1974). 6 E.R.C. 1275 , (see Appendix, pp. 1-93 for Opinion).* Public

* See explanatory note on page ii of Table of Contents.

hearings on possible routes to be used were held in 1959 and 1961, (Opinion, App. p. 6 ). Public hearings on the design of the highway were held in 1969, 1970 and 1971, (Op., App. p. 6 ). The proposed highway was divided into two projects of roughly equal length, designated Conn. Projects Nos. 93-74 and 51-130. Design study reports on these projects were submitted to the FHWA, together with a request for design approval, in August, 1970, (Op., App. p. 7 ), and were resubmitted in revised form in December, 1970, (Op. App. p. 7 ). At this time the cost of constructing I-291 was estimated to be $31,500,000, (Op., App. p. 7 ). If I-291 is constructed as part of the federal interstate highway system, 90 percent of the cost will be borne by the federal government, and 10 percent by Connecticut. See 23 U.S.C. § 120(c) (Op., App. p. 7 ).

2.

PREPARATION, CIRCULATION AND PUBLICATION OF THE EIS

On February 1, 1971, the FHWA Division Engineer for Connecticut advised the Commissioner of the Connecticut Department of Transportation (CONNDOT) that an EIS would be required for I-291, (Op., App. p. 7 ). Personnel of CONNDOT Bureau of Highways accordingly prepared a rough draft of an EIS (Op., App. p. 8 ). This rough draft was reviewed in February, 1971 by David

Densmore, a field employee of the Connecticut division of the FHWA (Op., App. p. 8 ). Defendant George Koch, then Chief of Design for the CONNDOT Bureau of Highways (until March, 1971), supervised preparation of a preliminary draft EIS based on the earlier rough draft and Densmore's comments thereon, (Op.,App. p. 8 ).

During the preparation of the preliminary draft, Densmore and two other FHWA engineers spoke almost daily, in person or by telephone, with CONNDOT personnel concerning the draft EIS, (Op., App. p. 8 ). Defendant Koch testified that the resulting preliminary draft was based more on his experience and knowledge of the project than on empirical data (Op.,App. p. 8 ). This preliminary draft was filed with the FHWA in June, 1971 and circulated among other federal agencies, (Op., App. p. 8 ). A list of these agencies was attached to the cover letter dated June 3, 1971 of the draft EIS, (Pls. Exh. 10.) Such agencies included the Council on Enviromental Quality (CEQ) (Op., App. p. 8 ). Due to the administrative confusion as to procedures to be followed by State highway authorities in preparing draft EIS's for submission to the FHWA, a copy of the preliminary draft EIS was not circulated to the Environmental Protection Agency (EPA), (Op., App. p. 9 and p. 80 ).

After comments from these agencies on the preliminary EIS were received by the FHWA and CONNDOT, and after a multi-

disciplinary team of experts in environmental problems had reviewed the draft EIS at the regional office of the FHWA, the final EIS was written by CONNDOT personnel in cooperation with Densmore and other FHWA employees, (Op., App. p. 9 ). Defendant A. J. Siccardi also contributed to the final EIS upon becoming FHWA Division Engineer for Connecticut on June 26, 1971, (Op., App. p. 9 ). The final EIS (Plf"s Exh. 23) was submitted to the FHWA's divisional office on February 24, 1972. This office forwarded the final EIS to the FHWA's regional office on February 28, 1972, with a cover letter noting that the EIS had been prepared in conformance with FHWA guideline and recommending the EIS's acceptance, (Op., App. p.10 ). After acceptance by the regional and Washington offices of the FHWA and the office of the Secretary of Transportation, the final EIS was filed with the CEQ on September 18, 1972, (Op., App. p. 10).

On or about October 4, 1972, public notice was given by newspaper publication that the EIS would be available for inspection for thirty days thereafter, (Op., App. p. 10). Shortly after the expiration of this thirty-day period, defendant Siccardi granted formal design approval for I-291 on November 6, 1972, (Op., App. p. 10).

FURTHER NOISE AND AIR STUDIES REQUESTED BY SICCARDI

On that same day, defendant Siccardi requested CONNDOT to give "further consideration" to the noise and air quality impacts of I-291, to reflect advances in noise and air quality evaluation techniques since preparation of the I-291 EIS and design study reports, (Op., App. p. 10 ).

CONNDOT personnel completed a noise impact evaluation for I-291 in February, 1973, (Op., App. p. 11). When it sent this report to Defendant Siccardi on March 6, 1973, CONNDOT noted that the report showed one area of open space to be noise sensitive, and recommended construction of a mound ten feet in height to attenuate this noise; defendant Siccardi's office concurred in this recommendation on April 4, 1973, (Op., App. p. 12 ).

CONNDOT commissioned an air quality study by the Research Corporation of New England (TRC), Pl's Exh. 39, (Op., App. p. 12 ). This report showed that projected 1990 traffic along I-291 would, under "worst-case" meteorological and traffic conditions, cause the level of hydrocarbons in the air to exceed EPA standards at three points near the expressway, (Op., App. p. 13 ).

On June 14, 1973, defendant Siccardi approved CONNDOT's "plans, specifications and estimates" (P.S. & E.) for the first

two miles of I-291 from I-91 to the Newington-Wethersfield town line. In the same letter in which he approved the P.S. & E. for this project (Pl's Exh. 41), defendant Siccardi also authorized CONNDOT to solicit bids for the construction of the first two miles of I-291. On September 6, 1973, a $10,996,216.92 contract for this construction was awarded to Arute Brothers, Inc. Arute began work under the contract on September 19, 1973. Its operations to the date of the hearing consisted of grading, clearing and drainage work, and the construction of temporary approaches, (Op., App. pp. 13-14).

On October 12, 1973, the defendant Siccardi notified CONNDOT that his office was accepting "without reservation the Air Quality Study as submitted." (Pl's Exh. 47, Op., App. p. 14). A memorandum of the same date from FHWA field engineer Densmore to Siccardi (Pl's Exh. 46) noted that reevaluation of the study had been prompted by the circulation on August 31, 1973, of an FHWA "Notice of Air Quality", a document not part of the record in this case but apparently concerned with air quality standards for federally funded highways, (Op., App. p. 14). The Densmore memorandum accepted the conclusion of the TRC study that I-291 would not cause significant air quality problems, and recommended no further delay in "future P.S. & E. approvals for the remaining projects on this section of I-291 due to air quality considerations," (Op., App. p. 14 ).

LACHES

Defendants claim that plaintiff was on notice of the contents of the final EIS for I-291 once the EIS was made available for public inspection on or about October 4, 1972 and for thirty days thereafter. Plaintiff waited until November 12, 1973 to file its complaint challenging the adequacy of the EIS, (Op., App. p. 15 ).

The FHWA has established location approval as the stage at which a state highway project proposed in contemplation of federal funding must be the subject of an EIS, (Op., App. p. 21). The FHWA may not grant location approval until at least thirty days after the final EIS has been filed with the CEQ and made available to the public, (Op., App. p. 22). However, the FHWA has also designated design approval as the crucial stage at least where location approval but not design approval had been granted prior to February 1, 1971. "In such instances, the environmental statement . . . or negative declaration shall be prepared and processed during the design studies. The final environmental statement or negative declaration for such highway sections shall be furnished to FHWA before or with the request for design approval." (PPM 90-1, Par. 6h; Opinion, App. p. 22).

Plaintiff herein could have challenged defendants'

compliance with NEPA once defendant Siccardi granted design approval to I-291 on November 6, 1972, (Op., App. p. 24).

## III.

## ARGUMENT

### A.

### LACHES IS A BAR TO THE RELIEF AWARDED TO THE PLAINTIFF

1. In support of this argument, the following chronology of events must be kept in mind:

a) Public hearings on possible routes to be used were held in 1959 and 1961;

b) Public hearings on the design of the highway were held in 1969, 1970 and 1971;

c) On January 30, 1972 EIS submitted by CONNDOT to FHWA;

d) March 20, 1972, EIS reviewed for content and accepted by FHWA;

e) Final EIS was filed with CEQ on September 18, 1972;

f) On or about October 4, 1972, public notice was given by newspaper publication that the EIS would be available for inspection for thirty days thereafter;

g) On November 6, 1972, defendant Siccardi granted formal design approval for I-291;

h) On November 6, 1972, defendant Siccardi requested CONNDOT to give further consideration to the noise and air quality impacts of I-291 to reflect advances in noise and air quality evaluation techniques;

i) On June 14, 1973, defendant Siccardi approved CONNDOT's plans, specifications and estimates (P.S. & E.) for the first two miles of I-291;

j) On September 6, 1973, a $10,996,216.92 contract for I-291 was awarded to Arute Brothers, Inc.;

k) On October 12, 1973, defendant Siccardi notified CONNDOT that his office was accepting the air quality study as submitted;

l) November 12, 1973, plaintiff filed its complaint challenging adequacy of EIS.

2. Plaintiff could have challenged sufficiency of EIS within thirty days after October 4, 1972.

The title page of the final I-291 EIS (Pl's Exh. 23) states "Prepared by the Connecticut Department of Transportation - Bureau of Highways - Office of Design." The District Court noted that this was an "accurate representation of the actual authorship of the EIS," (Op. App.pp.40-41). In this form the final EIS was publicized and made available to public scrutiny and evaluation on or about October 4, 1972. It requires no subtle argument to conclude that this statement was available for challenge at that time and at any future time by the plaintiff. Since the Court found merit in this challenge by the plaintiff in its Ruling of

February 7, 1974, (Op., App. p. 40 ) the same decision would naturally result with the same reason had the challenge been made at any time subsequent to October 4, 1972, the date of public notice. Greene County Planning Board v. Federal Power Commission, 455 Fed. Rep.2d, 412, cert. denied 409 U.S. 849, 93 S.Ct. 56, 34 L. Ed.2d 90 (1972), is noted by the Court as the compelling court decision supporting the plaintiff's challenge of authorship. Greene County was decided on January 17, 1972 almost nine months prior to the plaintiff's access to the final EIS.

The Court stated (Op., App. p. 19 ) that "plaintiff had no right, let alone obligation, to bring suit until the FHWA's sponsorahip of I-291 reached the point of a 'proposal for . . . major Federal action' within the ambit of section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) . . . ." The Court concluded that the project became a proposal for major federal action not until November 6, 1972, when defendant Siccardi granted design approval, (Op., App. p. 24 ). The Court's conclusion on this issue is not supported by the record since the final EIS (Pl's Exh. 23) sets forth in part the following statement on the inside title page: "This Highway Improvement is Proposed for Funding under Title 23, U.S.C. This Statement for Improvement was developed in Consultation with the Federal Highway Administration and is

Submitted Pursuant to Section 102(2)(C) Public Law 91-190 and Section 4(f) Public Law 89-670." A clearer pronouncement could not be expressed to indicate that the proposed project was already then considered to be a "major Federal action" for funding purposes.

The Court admits that the plaintiff could have challenged the adequacy of the EIS prior to the November 6, 1972 design approval of I-291 when the final EIS on I-291 was available for public inspection, (Op., App. p. 25 ). The Court observed that the "plaintiff has emphasized that it did not regard the I-291 EIS as inadequate enough to warrant litigation until it became aware of the air and noise studies requested by defendant Siccardi contemporaneously with his grant of design approval," (Op., App. p. 25 ). But the plaintiff became aware of the air and noise studies <u>after</u> retaining counsel in late October, 1973 which was prompted by the "actual commencement of construction" by the contractor, (Op., App. p. 32 ). Thus, we see the plaintiff securing services of counsel late in October, 1973 after having access to the final EIS since October 4, 1972.

The Court also found merit in plaintiff's contention that the EIS was inadequate in respect to its "discussion of alternatives,"(Op., App. p. 40 ), as it failed "to articulate at all at least two plausible alternatives to I-291 as presently conceived," (Op., App. p. 56 ). Obviously this alleged omission or failure of inclusion was readily apparent and detectable without expert evaluation and examination on October 4, 1972 when the

final EIS was made available for public comment and study. We conclude that the plaintiff was not diligent since with the exercise of reasonable effort it could have promptly informed the defendants shortly after October 4, 1972 that it considered the EIS to be inadequate in compliance with NEPA as to authorship and discussion of alternatives. It was unreasonable for the plaintiff to wait until November 12, 1973 to file its complaint challenging the adequacy of the EIS. During the intervening months, the design of I-291 was given final FHWA approval (June 14, 1973), bids were solicited and a contract for the initial segment awarded (September 6, 1973) and construction had begun (September 19, 1973), (Op., App. p. 15 ). The contractor's per diem expenses while construction is in progress are estimated to be $27,200, (Op., App. p. 18 ). Some of this expense continues and new expenses of storage and protection of materials had been incurred, (Op., App. p. 18 ). Plaintiff's lack of diligence has greatly prejudiced the public interest, public welfare and the interests of third parties. This prejudice is not outweighed by any public considerations since the provisions sought to be enforced by NEPA compliance are procedural and upon full compliance will not result in abandonment of the project but will cause costly delay in construction.

In Penn Mutual Life Ins. Co., v. Austin, 168 U.S. 685 at 698, the Court aptly stated:

"The requirement of diligence and the loss of the right to invoke the arm of a court of equity in case of laches, is particularly applicable where the subject matter of the controversy is a public work. In a case of this nature, where a public expenditure has been made, or a public work undertaken, and when one, having full opportunity to prevent its accomplishment, has stood by and seen the public work proceed, a court of equity will more readily consider laches." Penn. Mutual Life Ins. Co. v. Austin, 168 U.S. 685 at 698.

Clark v. Volpe, et al, 342 F. Supp. 1324 (March, 1972) (E.D. Louisiana) Affm'd 461 F.2d 1266, cert. denied 409 U.S. 1041 was considered by the District Court (Op., App. pp. 15-17) in support of plaintiff's claim that laches does not bar this action. We maintain that Clark supports the defendants' claim that laches is a bar to this action because of the facts found to exist throughout the period of inaction by this plaintiff. Here again we note that no EIS was prepared or filed in Clark whereas an EIS was filed in our case. As was stated in Clark and can be properly stated in our case: "The Court does not believe that Congress intended that a plaintiff should be permitted inexcusably to delay the filing of an injunction suit to the prejudice of other parties and after the expenditure of millions of dollars of public funds." (Id. p. 1327)

Plaintiff is not a lone individual concerned with the public trust in the environment whose voice is lost in the wilderness

of social and economic forces pressing for the construction of interstate highways. Plaintiff admittedly is a group and association of many individuals who for many years in large numbers lived in the area immediately affected by the proposed construction of I-291. The public hearings on possible routes held in 1959 and 1961 and on the design of the highway held in 1969, 1970 and 1971, gave full disclosure of the plans then existing for the construction of I-291. Such hearings provided full opportunity for public involvement in the agency consideration of environmental, social and economic considerations of whether to proceed with a project, the locations of the project and the design of the project. The requirement of holding such public hearings is set forth in Section 128 of the Federal Highway Act, 23 U.S.C.

The pertinent portion of Section 128 provides that:

> "(a) Any State highway department which submits plans for a Federal-aid highway project involving the by-passing of, or going through, any city, town or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for

the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway. Such certification shall be accompanied by a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered.

"(b) When hearings have been held under subsection (a), the State highway department shall submit a copy of the transcript of said hearings to the Secretary, together with the certification and report."

Many a determination has been overturned for a failure to properly provide an opportunity for public participation under this statute and its implementing regulations. See e.g., Monroe County Conservation Society v. Volpe, 472 F.2d 613 (2d Cir. 1973); Fayetteville Area Chamber of Commerce v. Volpe, 463 F.2d 402 (4th Cir. 1973). The Supreme Court in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-416, 91 S. Ct. 814, 823 (1973), emphasized the nature and availability of this administrative remedy to the public when it said:

" . . .And the only hearing that is required by either the Administrative Procedure Act or the statutes regulating the distribution of federal funds for highway construction is a public hearing conducted by local officials for the purpose of informing the community about the proposed project and eliciting community views on the design and route. 23 U.S.C. § 128 (1964 ed., Supp. V) . . . ."

It, therefore, appears that the plaintiff had a wealth of opportunities for a period of several years prior to this action to present its views, challenges and suggestions relating to the determination of the final location of I-291 based upon full consideration of all reasonable and proper alternatives to the proposed construction. We respectfully disagree with the District Court's conclusion that there is merit to the plaintiff's claim that the EIS is deficient for failure to adequately describe and discuss alternatives. We also respectfully urge that under the facts of this case, laches is a bar to the relief sought and awarded by the District Court to the plaintiff.

The District Court quotes at length from the decision in Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 at 1326, 1327, 1329-1330 (Op., App.pp.30-32) in support of its conclusion that laches is not a bar to this action. We point out that in Arlington Coalition unlike in our case no EIS was prepared or filed by the federal agency. Thus, the mandate of NEPA for requiring preparation of an EIS was held not to be dissolved by the apparent delay of the plaintiff in commencing litigation.

The District Court cited Environmental Defense Fund v. Tenn. Valley Auth., 468 F.2d 1164, 1182-1183 (6th Cir. 1972) as

being in accord with Arlington Coalition, (Op., App. p. 32 ). We point out that in Environmental Defense Fund the EIS was filed in June, 1971 and plaintiff filed suit within two months after having opportunity to study it and to consult with its own experts, (Ibid, p.1182). Under such circumstances, the delay of the plaintiff was not unreasonable. In our case, plaintiff permitted the State of Connecticut to acquire properties, dislocate large number of people and industry and to spend over 15 million dollars for such purposes, (Op., App.pp 18-19) as well as to enter into a contract with Arute Bros. for the sum of $10,996,216.92.

The District Court stated (Op., App. p. 79 ) that "Had the post - EIS I-291 noise and air quality studies been circulated for comment as a draft supplemental EIS, then under PPM 90-1 they would have been disclosed to the public, thereby changing the entire posture of this case, particularly in regard to laches." In this respect, the District Court supported the plaintiff's emphasis "that the best evidence of the possible inadequacy of the I-291 EIS" were the "air and noise pollution studies requested by the FHWA on the same day as design approval for the project was granted." (Op., App. p. 17 ) In this, we cannot agree. We support the District Court's finding that "while the studies offered no conclusive evidence of the advisability vel non of building I-291, they at least made the advisability of

proceeding with I-291, a question upon which, in the light of the two studies, reasonable men could disagree." (Op., App. p.32 ) On this point, we observe that NEPA's basic concern and purpose is not to mandate a forum for expression of disagreement among reasonable men. NEPA is most vitally concerned with the "advisability vel non of building I-291." If we conclude that I-291 will be built, we must also conclude that full consideration must be and will be given by the federal and state agencies to the impact of this project upon air quality and noise levels. A contrary conclusion would in effect declare anticipation of intentional noncompliance of state and federal laws by the respective state and federal officials in the performance of their duties.

B.

AUTHORSHIP OF EIS IS IN COMPLIANCE WITH NEPA

The District Court made the following conclusion: "Since the final I-291 EIS was prepared in accordance with the PPM 90-1 policy of state authorship, there appears to be a strong probability that defendants would be found in noncompliance with NEPA on this point at a trial on the merits of plaintiff's complaint." (Op., App. pp.49-50).

This conclusion is reached by the District Court after making the following statement and findings: (Op., App. p.41 )

"Plaintiff contends that the FHWA, by leaving the writing of the EIS to CONNDOT, failed to comply with the explicit statutory command of NEPA's Section 102(2)(C) directing 'all agencies of the Federal Government' to include in reports or proposals subject to NEPA 'a detailed statement by the responsible official,' whom Section 102(2)(c) also refers to as 'the responsible Federal official' 42 U.S.C. § 4332(2)(C) (emphasis added). Were plaintiff's contention to present a question of first impression, the Court might be free to view the previously catalogued, extensive cooperation of FHWA personnel with CONNDOT personnel in the preparation of the draft and final I-291 EIS's as constituting sufficient compliance with the statutory mandate that the EIS be prepared by personnel of the federal agency charged with compliance with NEPA. But previous case law in this Circuit compels this Court to demand strict compliance with the letter as well as the spirit of NEPA as regards authorship of an EIS."

The District Court thereupon cites the following cases decided in this Circuit: Greene County Planning Board v. Federal Power Commission, supra; Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731 (D. Conn. 1972) and Conservation Society of Southern Vermont v. Secretary of Transportation, 362 F. Supp.

627 (D. Vt. 1973). The Court noted (Op., App. p. 44 ) that "the facts of the instant case are arguably distinguishable in two respects from the situation confronted by Judge Oakes. Here, the extent of the communication and consultation between CONNDOT and the FHWA seems to have gone beyond the level of informal chats. . . . Subordinates of the FHWA Division Engineer were in fairly constant contact with CONNDOT, did do some editing of the preliminary draft, and this draft was reviewed in detail by the regional office of the FHWA. FHWA personnel continued to monitor CONNDOT's preparation of the final EIS. Nevertheless, the actual writing of the final EIS was clearly done by CONNDOT personnel, not FHWA personnel." (Op., App. p. 44 ) The Court explained that "A second arguable distinction between the instant case and Southern Vermont is the apparent lack of any legislative requirement that CONNDOT proceed with I-291." (Op., App. p. 47 )

Thus, we ask this Circuit Court of Appeals whether the District Court was correct in concluding upon the facts of the instant case that Greene County decision, supra, compels the District Court fo find that the authorship of the I-291 EIS is not in compliance with NEPA. Does Greene County, supra, decide that NEPA requires that the physical gathering of information

necessary for the preparation of the EIS can only be done by the "responsible federal official" or, otherwise stated, does Greene County, supra, demand that the actual writing of the I-291 EIS must be done by the "responsible federal official" staff? We do not think so.

In Greene County, supra, the parties were "in vigorous disagreement over when the Commission must make its impact statement." Id. at p. 418 (Emphasis ours). This Circuit Court expressed its key concern in Greene County in this language:

> "The Federal Power Commission had abdicated a significant part of its responsibility by substituting the statement of PASNY for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and once again to act as an umpire. (footnote omitted) The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant's statement will be based upon self-serving assumptions. . . ." Id. at p. 420. (emphasis ours)

We note that in Greene County this appellate court concluded "that the Commission was in violation of NEPA by conducting hearings prior to the preparation by its staff of its own impact statement . . . ." (Id., p. 422) (emphasis original). The Appellate Court stated further that ". . . we deem it essential that the Commission's staff should prepare a detailed statement before the Pending Examiner issues his

initial decision." Id., p. 442. The facts in Greene County are not parallel or similar to the instant case. In Greene County the Commission adopted the stubborn position that there was no "obligation to prepare an environmental statement prior to the licensing hearings and that the applicant's statement, 'information comparable' to a statement of its own, sufficiently identifies the issues." Id., p. 421. Furthermore, the Commission substituted the Statement of PASNY for its own, thereby eliminating scrutiny of such an analysis during the "agency review process" required by Section 102(2)(C) of NEPA. In effect the Commission was delegating its responsibility under NEPA to prepare the EIS to PASNY. We understand that such delegation of responsibility represents violation of NEPA's clear mandate that a proposal of a major Federal action significantly affecting the quality of the human environment must include a "detailed statement by the responsible official."

In our own case, the facts demonstrate, in numerous ways, that there has been no delegation of responsibility for preparation of the EIS by the FHWA to CONNDOT. The District Court made numerous findings of FHWA input which appear throughout the Court's decision, (Op.,App. pp. 8,9, 10, 41, 44, 45, 46 ) and expressed a

significant awareness and near conviction that "the previously catologued extensive cooperation of FHWA personnel with CONNDOT personnel in the preparation of the draft and final I-291 EIS's as constituting sufficient compliance with the statutory mandate that the EIS be prepared by personnel of the federal agency charged with compliance with NEPA." (Op., App. p. 41 ). In view of such numerous findings that CONNDOT and FHWA worked closely together in preparation of the EIS, we do not agree with the District Court's damaging inference that "CONNDOT is just as likely to lard an EIS with 'self-serving assumptions' as were the state highway department in Southern Vermont and the state power authority in Greene County." (Op., App. p. 49 ). Nowhere in the record do we recall any proof of the inclusion in the EIS of "self-serving assumptions" authored by CONNDOT. The record does contain and the District Court did find numerous instances of FHWA direction and control of the EIS preparation and input. (The testimony of Donato Altobelli, Director of the Office of Environment and Design for FHWA, Region I, Tr. pp. 281, 286, 287, 288). In stating (Op. App. p.47 ) that the CONNDOT engineers' participation in preparation of the I-291 EIS may reflect personal interests in promoting approval by FHWA and that " CONNDOT's perspective may well be far different from that demanded of an EIS by

Congress," the District Court is seeking support for its decision by an assumption which is contradicted by the facts and the findings.

We urge this appellate court to agree with our position that the facts appearing in the instant case as reflected in the findings of the District Court do not reveal that FHWA had delegated to CONNDOT the responsibility for the preparation and writing of the I-291 EIS. We fail to see how the already printed and bound volume of the final I-291 EIS establishes a "take it or leave it" posture, with no options other than approval in toto or rejection in toto as a matter of law, as expressed by the District Court, (Op., App. pp.45-46). The Court's conclusion that "the FHWA regional office's review of the final EIS in the instant case was limited to approval without any alteration" is not a fact which is supported by the record, (Op. App. p. 46 ).

In his testimony appearing on pages 288-289 of the transcript, Donato Altobelli, FHWA Director of the Office of Environment and Design, testified as follows with respect to the final I-291 EIS:

> "Then when the final environmental impact statement is developed, it comes to Mr. Siccardi. He is required to review--meanwhile he has been working on, you know, a continuous basis to resolve issues that are raised by different people. And he then has to make a recommendation to us that that final environmental impact statement developed by Federal Highway and Division Office jointly together responds to the issues that were raised by the public and other agencies.

"It comes to my office and then we review it for a similar. Then we go back to each person on the task force that made a comment on the draft and ask him to review the environmental impact statement and tell me whether he is satisfied that the comments were covered.

"And then in this case that was done. It was reviewed by the people who had commented and then a recommendation was made to my boss, the Regional Federal Highway Administrator that he approve the final environmental impact statement."

Thus, the facts of our case show that the Regional Federal Highway Administrator who was charged with responsibility for review and acceptance of the final I-291 EIS (Op., App. p. 46 ) did not merely rubber-stamp CONNDOT's efforts and conclusions, but in fact "reviewed, approved and adopted the statement, thus making it his own." (See Finish Allatoona's Interstate Right, Inc. v. Volpe, 484 F.2d 638 (5th Cir. 1973) affirmed, 355 F. Supp. 933 (N.D. Ga. 1973).

As stated in Iowa Citizens v. Volpe, 6 ERC 1085 at p. 1091 (CCA 8th Cir. Nov. 1973):

"Section 102(2)(C) of NEPA requires a detailed statement of the environmental impact of a federal project by the responsible federal official. It does not specifically state how such official shall obtain the information upon which his statement is based. Since the enactment of NEPA, FHWA with the acquiescenseof the Council on Environmental Quality (footnote omitted), and the knowledge of Congress (footnote omitted), has consistently interpreted the provisions of NEPA as permitting the delegation of the physical act of gathering the information necessary for the preparation of Section 102(2)(C) EIS to the state highway departments recommending the proposed federal-aid highways."

And on the issue of authorship as stated in National Forest Preservation Group v. Volpe, 352 F. Supp. 123, 127 (1972):

> " . . . The statutory authority for the construction of Federal-aid highways requires cooperation and heavy reliance between the FHWA and the State HA. 23 U.S.C. § 101, et seq. There is no indication in this case that the EIS prepared by the HA is self-serving. It should not be presumed that states are not concerned with the environmental problems facing us all. . . ."
>
> * * * *
>
> "Inasmuch as Section 102(2)(C) does not explicitly require that a federal official prepare the EIS this Court cannot find as a matter of law that preparation of the EIS by the HA is a violation of the spirit or the mandate of the NEPA."

Because of the particular facts and plentiful findings appearing in the instant case, we respectfully urge that the District Court's ruling that the authorship of the I-291 EIS is not in compliance with NEPA be reversed.

C.

SUFFICIENCY OF EIS IN DESCRIBING AND DISCUSSING ALTERNATIVES

The District Court concluded that the I-291 EIS was not in compliance with the requirements of NEPA in its description and discussion of alternatives. The court found insufficiency even as to the alternatives discussed in the I-291 EIS (Op., App. p. 56 ). The Court also concluded that "the omission of any mention in the

I-291 EIS of the Route 9 - Route 7 and the Siccardi alternatives clearly constitutes noncompliance with NEPA." (Op., App. p. 62 ).

"Section 102(2) does not require that 'each problem be documented from every angle to explore its every potential for good or ill'" Iowa Citizens v. Volpe,6 ERC 1088, 1089; Sierra Club v. Froehlke, 345 F. Supp. 440, 444 (W.D. Wis. 1972).

"The question to be asked is whether all reasonable alternatives to the project have been considered, even if some were only briefly alluded to or mentioned." Iowa Citizens v. Volpe, supra, 1090; Environmental Defense Fund, Inc. v. Armstrong, 352 F. Supp. 50, 57 (4 ERC 1760) (N.D. Cal. 1972).

" . . . The discussion of environmental effects of alternatives need not be exhaustive. What is required is information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned." Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (1972) D.C. App. at 836.

"What the court looks for is an informed and adequately explained judgment. When courts can say that such a judgment has been made, their mission is at an end." Silva v. Lynn, 482 F.2d 1282, (1st Cir. 1973).

The final I-291 EIS is part of the record of this case and must speak for itself. (Pl's Exh. 23) We claim that the EIS is sufficient as to inclusion and discussion of alternatives from all

the evidence presented to the Court in the instant case on this point.

D.

ADEQUACY OF EIS IN CONSIDERATION OF POTENTIAL NOISE AND AIR QUALITY IMPACTS OF I-291

The District Court concluded that based on the evidence before it, that I-291 EIS gave inadequate consideration to the potential noise and air quality impacts of I-291, (Op. App. p. 73 ). The court indicated that such inadequacy may possibly be cured by a supplemental EIS (Op., App.pp.74-76), which would result, in circulation of air and noise impact studies (Pl's Exh. 39 and 36) among the various federal agencies.

We agree with the District Court that the air and noise studies (Pl's Exh. 39 and 36) were not circulated as a supplemental EIS among the various federal agencies nor do we maintain that they functioned as such. However, we take the position that the final I-291 EIS contained adequate discussion of air and noise impact studies at the time of its approval by FHWA. As stated by Siccardi, he based his request for additional noise and air quality studies on advances in air quality and noise evaluation technology since the writing of the EIS, (Op., App.pp.72-73). We claim that notwithstanding said request for additional studies, the I-291 EIS was not

defective in this respect as a matter of law. Assuming arguendo that the air and noise considerations included in the EIS were in need of updating, this alone would not render the EIS defective under NEPA.

The District Court significantly noted that "the noise and air pollution problem broached in the post - EIS studies are certainly significant. But they appear to be nowhere near so drastic as to permit the Court to conclude, under the narrow standard of substantive review previously discussed, see pp. 35-39 supra, that defendants' decision to proceed with construction of I-291 was arbitrary or capricious. . . ." (Op., App. p. 88 ).

## IV.

## CONCLUSION

For the reasons set forth in this brief, the state defendants respectully urge and pray:

1) That the decision of the District Court be reversed and that the I-291 EIS be found in compliance with NEPA as to a) authorship, b) adequacy in its description and discussion of alternatives, c) adequacy in its consideration of potential noise and air quality impacts of I-291, and

2) That this Court rule that laches is a bar to the relief requested by and awarded to the plaintiff in this case.

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## CERTIFICATION OF SERVICE

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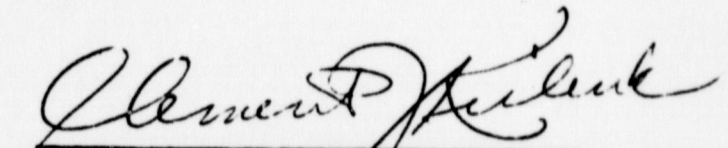

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